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CORRESPONDENCE.

SUGGESTED CHANGES IN CRIMINAL STATUTES—VA. CODE ANNO. SECTIONS 4023
AND 3897.

To the Editor of the Virginia Law Register :

A recent experience in assisting in the prosecution of an important criminal case has impressed the fact upon my mind that there is need of amending several sections of the Code, and of changing the general criminal law at least in one particular.

The first is section 4023, that gives to the accused the right to strike off from the panel of sixteen four names, but gives the commonwealth's attorney the right to strike off none.

This should be amended so as to give the accused the right to strike off two, and the commonwealth's attorney the right to strike off two.

I have known particularly of one mis-trial that resulted from the fact that the commonwealth's attorney could not strike off a man without assigning cause. And no doubt the same result has happened in the experience of most lawyers.

There is not a particle of sense in this discrimination in favor of the accused.

Every lawyer of any practice knows that there are men who are influenced by their personal likes and dislikes while serving as jurors, but who upon an examination on the *voir dire*, will deny that they have any bias. The commonwealth's attorney may know that he is playing with loaded dice, yet he can do nothing. Make it equal. Give the accused and the commonwealth's attorney the right to strike off two each—that is a plenty.

The other section is 3897, that reads as follows: "In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and be subject to cross-examination, as any other witness, but his failure to testify shall create no presumption against him, nor be the subject of any comment before the court or jury by the prosecuting attorney."

Now what is the sense in that?

At common law an accused was not allowed counsel; later he was not allowed to testify. In that state of things the courts leaned, and ought to have leaned, towards the accused.

He was sitting with his mouth shut, without the power to explain what had happened, when his explanation would have thrown a light upon the whole matter that might have established his innocence.

But, when he is allowed to tell his side, and does not choose to do so, why should the commonwealth's attorney not be allowed to comment on his failure to testify?

If a man is innocent, he can always say something that will aid his cause, and he will be only too glad of the opportunity of presenting his side. If he does not testify, it is because he is guilty, and is afraid of being caught.

It seems to me that the trouble is, that the revisors, when they framed the Code of 1887, just as in the Married Woman's chapter, did not go far enough. In other words did not change the law so as to carry out, to a logical conclusion,

the change made by the Act of 1881-2, allowing one accused of crime to testify in his own behalf.

Amend the Act so as to allow the commonwealth's attorney to comment on the failure to testify. And in that event the accused will always testify. If he is innocent, he will be helped ; if he is guilty, he will be caught, as he ought to be.

The other particular doctrine that I think needs change is the rule of law that does not let the commonwealth's attorney prove the bad character of an accused, unless the accused tries to establish his good character. This is another one of the safeguards thrown around an accused when he could not testify,

What good reason can now be given for its present existence?

The accused has a right to prove a good character in order to prove that he is not the kind of a man who would commit the crime of which he is accused.

Why, then, should not the commonwealth's attorney have the right to prove that his character is bad, in order to prove that he is the kind of a man who would be likely to commit the crime of which he is accused? No doubt that there would often be a failure of justice but for the fact that some of the jury are apt to know something of the accused.

It is a poor rule that does not work both ways.

Our law-makers evidently have not realized the extent of the change made by allowing an accused to testify in his own behalf.

Carry out this change to its logical conclusion, and then there will be fewer miscarriages of justice.

The accused has a right to have counsel. He has the right to testify in his own behalf. He is presumed to be innocent until his guilt is established.

What more does he need?

In every other respect, except that the Commonwealth must establish his guilt beyond a reasonable doubt, and that the burden of proof is upon the Commonwealth, let the Commonwealth and the accused stand upon an equal footing.

I have made up my mind that when the next Legislature meets, I will go before the Committee of Courts of Justice and advocate these changes. And it is with the hope that I may have the assistance of other members of the legal profession who want to see the innocent escape, and the guilty punished, that I have written this article.

Livingston, Va.

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